No. 98-436

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

JOHN H. ALDEN, et al.,

Petitioners,

versus

STATE OF MAINE,

Respondent.

On Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF OF *AMICUS CURIAE* COMMONWEALTH OF KENTUCKY IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae, The Commonwealth of Kentucky submits this Brief in support of Respondent, the State of Maine. The Commonwealth of Kentucky requests that this Court affirm the judgment of the Supreme Judicial Court of Maine which affirmed the State Superior Court's dismissal of Petitioner's claims that the State of Maine violated the provisions of the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201 et seq.

Pursuant to Supreme Court rule 37.6, no counsel for any party in this case authored *Amicus Curiae* brief in whole or in part, and no person or entity, other than the *Amicus Curiae* made a monetary contribution to the preparation or submission of the brief.

The Commonwealth of Kentucky, like the State of Maine, is a party to a state court action by employees alleging a violation of the FLSA.[1]

Like Maine, the Commonwealth of Kentucky maintains sovereign immunity.

WRITTEN CONSENT OF THE PARTIES

The Commonwealth of Kentucky has received a written consent of the Petitioners (from their counsel), the Respondent State of Maine (from the Department of Attorney General) and from the United States and the Solicitor General, pursuant to Supreme Court Rule 37.3(a). These letters of consent have been filed with the Clerk of the Court accordingly.

STATEMENT OF THE CASE

Petitioners who are parole and probation officers in Maine, sought to recover overtime pay to which they claimed

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[1] *Lee Jackson, et al v. Commonwealth of Kentucky, et al,* Franklin Circuit Court, No. 96- CI-00621, Div. 1

entitlement by virtue of the FLSA, 29 U.S.C. 201 et seq., *supra*. Petitioner's began their action in U.S. District Court. After this Court rendered its decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44, (1996) U.S. District Court dismissed Petitioner's claim. The decision was affirmed on appeal.[2] and Petitioners filed this action in a Maine superior court. The trial court dismissed the officers claim and the Respondent's appealed to the Maine Supreme Judicial Court which affirmed the Superior Court's dismissal on August 4, 1998. Petitioners' petition for writ of certiorari was filed on September 14, 1998 and was granted on November 7, 1998. 119 S.Ct. 443.

SUMMARY OF ARGUMENT

First, it has been established that Congress may not abrogate state sovereign immunity pursuant to the Commerce Clause in federal court. This Court's decision in *Seminole Tribe of Florida* v. *Florida, infra,* rests upon the principle of state sovereign immunity presupposed by the literal text of the 11th Amendment. In *Hans* v. *Louisiana, infra,* the Court recognized that the Eleventh Amendment applied to federal question jurisdiction. The Court has shown deference to state sovereignty by requiring an unequivocal statement of congressional intent in order to abrogate Eleventh Amendment immunity in federal courts in cases such as *Atascadero State Hospital* v. *Scanlon, infra.* Abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal Government and the States and has historically been permissible only pursuant to the Fourteenth Amendment and, until *Seminole Tribe,* the Commerce Clause.

In 1975, *Fitzpatrick* v. *Bitzer, infra,* established the principle that legislation pursuant to the Fourteenth Amendment may abrogate state sovereignty. In doing so,

[2] *Mills v. State of Maine, 118 F3d 37 (1st Cir. 1997)*

the Court recognized that such abrogation would be unconstitutional in other contexts. The Court recognized that the Fourteenth Amendment was specifically directed at the States and that it provided that Congress should have the power to enforce its provisions. As the Fair Labor Standards Act is Commerce Clause legislation, it constitutionally attempts to impose monetary liability for individual claims upon the States without their consent.

Second, in *Printz* v. *United States, infra,* this Court held that the Supremacy Clause makes laws only constitutional laws supreme. When a federal law passed pursuant to the Commerce Clause violates state sovereign immunity, that law is not valid.

The check that constitionality places upon supremacy is reflected by Alexander Hamilton's description of federal supremacy in the Federal Papers and subsequent decisions.

Third, the constitutional principle of state sovereign immunity extends beyond the literal text of the Eleventh Amendment and its narrow application to federal courts. This is implicit in the language used by the Framers and is explained by this Court's decisions. Federal question jurisdiction and the scope of the modern federal legislation was not contemplated by the Framers.

The States possess a "residuary and inviolable sovereignty" which is contemplated by the reservation of powers to the States not expressly delegated to the United States. This is reflected not only in the Tenth Amendment but throughout the Constitution's text. The constitutionality of state sovereign immunity is established also by this Court's decisions which recognize that the Eleventh Amendment is rooted in respect for the dignity of States as sovereign. "In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power of Article III." *Pennhurst State School and Hospital* v. *Halderman, infra.*

Fourth, if the Petitioners prevail, federal law will be asymmetrically applied in federal and state courts. The anomaly of claims pursuant to federal laws being only enforceable in state courts cannot be justified by dicta alone. The Court should consider the principle of symmetry in the application of the law and the law should be uniform in both federal and state courts. If the Fair Labor Standards Act is unconstitutional when it attempts to abrogate state sovereign immunity in federal court, it should also be unconstitutional to state court proceedings.

Fifth, our federalism is our unique contribution to the principles of domestic governance. It conceives of the national and state governments checking others and of both governments being democratically accountable to the people.

ARGUMENT

I. Congress Lacks Authority Under The Commerce Clause To Abrogate Sovereign Immunity Under The 11th Amendment

It has been proposed that the only limit upon the Federal Government's power to interfere with State functions may be found in the procedural safeguards inherent in the structure of the Federal system and that there should not be judicially created limitations on Federal power. *Garcia vs. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985). This Court has now held that the Eleventh Amendment denies Congress authority to abrogate state sovereign immunity pursuant to Commerce Clause Legislation. *Seminole Tribe of Florida vs. Florida*, 517 U.S. 44 (1996).

Petitioners assert that the Eleventh Amendment should be restricted to its literal terms in applying only to diversity cases involving "citizens of another state" and "citizens or subjects of any foreign state". This Court rejected

this literal construction. *Hans vs. Louisiana* 134 U.S. 1, (1890). *Chisholm vs. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793), was a diversity case. It was decided by this Court on February 18, 1793. On February 19, a resolution was introduced in the United States House of Representatives which was redrafted and ratified within two years by the States as the Eleventh Amendment. "The text [of the Amendment] dealt in [its] terms only with the problem presented by the decision in *Chisholm*; in light of the fact that the Federal Courts did not have federal question jurisdiction at the time the Amendment was passed (and would not have until 1875), it seems unlikely that much thought was given to the prospect of federal question jurisdiction." *Seminole Tribe*, S.Ct at 1130.[3] The Framers and Ratifiers of the Constitution were silent on the subject of federal question jurisdiction and the power of Congress to abrogate the States' immunity. *Id.* at 1130-1131. But "[t]he Court long ago held that the Eleventh Amendment bars a citizen from bringing suit against the citizen's own State in Federal Court." *Welch vs. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 472 (1987). It is clear that the presupposition which the Eleventh Amendment confirms extends beyond it text. *Blatchford vs. Native Village of Noatak*, 501 U.S. 775, 779 (1991).

The Court has shown significant deference to state sovereign immunity when examining attempts by Congress to abrogate that immunity. Nevertheless, this Court has rec-

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[3] Six years after the passage of the Eleventh Amendment, Congress enacted a statute providing for general federal jurisdiction. Act of February 13, 1801 §11, 2 Stat. 1992. It was repealed by the Act of March 8, 1802, 2 Stat. 132, *Seminole Tribe*, S.Ct at 1152 n. 12 (Souter, J. dissenting).

ognized that Congress, acting in the exercise of its enforcement authority under §5 of the 14th Amendment, may abrogate the States' 11th Amendment immunity. *Fitzpatrick vs. Bitzer*, 427 U.S. 445, 456 (1976). It has stressed, however, "that abrogation of sovereign immunity upsets the fundamental constitutional balance between the Federal government and the states". *Delmuth* v. *Muth*, 491 U.S. 223, 227 (1989) citing *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 238 (1985). Abrogation places "a considerable strain on the principles of federalism that inform Eleventh Amendment doctrine". *Pennhurst State School and Hospital* v. *Halderman*, 475 U.S. 89, 100 (1984) quoting *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978). This has Court tempered Congress' powers of abrogation pursuant to the Fourteenth Amendment with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure by applying a simple but stringent test: "Congress may abrogate the state's constitutionally secure immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute", *Atascadero, supra*, U.S. at 242 cited by *Dellmuth*, U.S. at 227.

This principle has been invoked to strike down attempts to abrogate Eleventh Amendment state sovereign immunity. *Atascadero, supra*; *Delmuth* v. *Muth, supra*; *Pennhurst State School, supra*. This Court has recognized that the important role played by the 11th Amendment and the broader principles that it reflects extend beyond the requirement of unequivocal statutory language. The Court has also considered whether Congress has the power to unilaterally abrogate the state's immunity from suit. Prior to *Fitzpatrick vs. Bitzer*, 427 U.S. 445, (1976), no such power had been identified. Only in the exercise of one other power, that of the Commerce Clause, has congressional abrogation of the state's Eleventh Amendment immunity been upheld, *Pennsylvania* v. *Union Gas Company*, 491 U.S. 1 (1989) overruled by *Seminole Tribe, supra*. Congress does not have the power to abrogate state sovereign immunity pursuant to the Interstate Commerce Clause, U. S. Constitution, Article I, cl. 8, *Seminole Tribe*, 116 S.Ct. at 1125.

In *Fitzpatrick*, the Court recognized: "that the 14th Amendment by expanding federal power at the expense of state autonomy, has fundamentally altered the balance of state and federal powers struck by the constitution". "§1 of the 14th Amendment contained prohibitions expressly directed at the states and . . . §5 of the Amendment expressly provided that the congress shall have the power to enforce by appropriate legislation, the provisions of this Article". Thus, the Court in *Fitzpatrick* found that "Congress may in determining what is appropriate legislation for the purpose of enforcing the provisions of the 14th Amendment, provide for private suits against the state or state officials which are constitutionally impermissible in other contexts". *Fitzpatrick*, 427 U.S. at 456, U.S. Constitution, 14th Amendment.

The Fair Labor Standards Act is legislation enacted pursuant to the Commerce Clause, *Aaron* v. *Kansas*, 1115 F.3d 813 10th Cir. (1997). The Petitioners' argue that the state sovereign immunity which this court has re-affirmed to be an essential part of the Eleventh Amendment does not adhere in state court. *Seminole Tribe, supra*. But this court has also held that a federal statute enacted pursuant to the Commerce Clause which violates the principle of state sovereignty when it imposes liability on the states is not enforceable. *Printz* v. *U.S.*, 521 U.S. 898 (1997). If the Fair Labor Standards Act is unconstitutional in its application to States how may it apply in state courts?

II. The Supremacy Clause Makes Laws of the Land Only Laws of the United States Which Shall Be Made In Pursuance of the Constitution

The Supremacy Clause requires state courts to enforce federal laws. *Howlett* v. *Rose*, 496 U.S. 356 (1990). But *Printz* v. *U.S., supra*, makes it clear that supremacy is contingent upon constitutionality:

> The supremacy clause, however, makes "laws of the land" only "laws of the United States which shall be made in pursuance [of the constitution]"; so the supremacy clause merely brings us back to the question discussed earlier, whether laws...violate state sovereign and are thus not in accord with the constitution. *Id.* 2379.

"It is incontestible that the constitution established a system of 'dual sovereignty'" *Id.* at 2376. The states retain a "residuary and inviolable sovereignty", The Federalist, No. 39, (James Madison) cited *Id.* at 2376. Although federal law is enforceable in state courts, it is not enforceable against states if that residuary and inviolable sovereign is transgressed. Alexander Hamilton contemplated such a possibility when he wrote:

> It merits particular attention . . ., that the laws of the confederacy as to the enumerated and legitimate objects of its jurisdiction will become the supreme law of the land; to the observance of which all officers, legislative, executive and judicial in each state will be bound by the sanctity of an oath. Thus, the legislators, courts, and magistrates, of the respective members will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws." *The Federalist*, No. 27, (Alexander Hamilton).

This Court has held this language does not support the imposition on states or a variety of executive functions at the direction of the Federal Government. *Printz*, 116 U.S. at 2391 (Souter J. dissenting). In *Printz*, Congress unequivocally expressed its intent to abrogate State sovereign immunity but was held to have exceeded its "just and constitutional authority". Therefore, the Fair Labor Standards Act may only operate as supreme law of the land if its abrogation of state sovereign immunity is found to be constitutional as to state courts even though it is unconstitutional as to federal courts. "It is inherent in the nature of soverignity not to be amenable to the suit of an individual without its consent" would thereby be amended, to read: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual brought in Federal Court without its consent." This is an argument which would be tenable only if there simply were no constitutional principle of State sovereign immunity. *Atascadero, supra* (Brennan, J. dissenting).

III. There Is a Constitutional Principle of State Sovereign Immunity

The question of States' monetary liability pursuant to the Fair Labor Standards Act presents again the confrontation between those who believe that "there simply is no constitutional principle of State sovereign immunity" *Id.* and "those who believe our Federal system requires something more than an unitary, centralized government." *Garcia, supra.* This Court has held that the states retain their sovereignty in our Federal system and "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole Tribe, supra; Hans vs. Louisiana, supra*, citing The Federalist No. 81, (Hamilton) p. 487(C. Rossiter Ed. 1961).

Is state sovereign immunity restricted to being a token prohibition of the 11th Amendment to Federal Court jurisdiction? If the Supremacy Clause requires State courts to enforce federal law despite the assertion of sovereign immunity, the States are clearly subject to suit without their consent at the will of Congress. Opponents of ratification feared this outcome, but it was not the stated intention of the Constitution's proponents. In most of the States in 1789 "the doctrine of sovereign immunity forbade the maintenance of suits against States in state courts, although the actual effect of this bar in frustrating legal claims against the State was unclear." *Atascadero, supra*, 473 U.S. at 261 (Brennan, J. dissenting). When proposed, Article III seemed to make the State vulnerable to lawsuits by citizens of other States or foreign nationals before the newly proposed Supreme Court. The records of the Constitutional Convention "do not reveal any substantial controversy concerning the State citizen and State alien diversity clauses." *Id.* at 263. The question was however raised at State ratification conventions. Participants such as George Mason in Virginia found the prospect of States being sued for their war time debts "disgraceful" and "ludicrous". James Madison responded to Mason's concerns by assuring the Virginia Assembly with regards to Article III, that "it is not in the power of individuals to call any State into Court" and that the only operation [Article III] can have, is that, "if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court" *Id.* at 265, citing *3 J. Elliott, Debates on the Federal Constitution*, 526, 527. Patrick Henry followed, and, opposing ratification, took Madison to task for the literal text of Article III. *Id.* at 266 citing 3 Elliot, p. 549. John Marshall responded in favor of ratification, stating that "I hope that no gentleman will think that a State will be called at the bar of the Federal Court. It is not rational to suppose that

the sovereign should be dragged before a Court" *Id.* at 267, citing 3 Elliot, p 555-556.[4]

"A sober assessment of the ratification debates thus shows that there was no firm consensus concerning the extent to which the judicial power of the United States extended to suits against States" *Id.* at 278; but see *Employees vs. Missouri Department of Public Health*, 411 U.S. 279, 291 (1973). In *Chisholm* v. *Georgia* 2 Dall. 419 (1793) a majority of the Court held that federal jurisdiction extended to suits against states under the state citizen diversity clause. James Wilson, a supporter of the Constitution's ratification, who nevertheless disagreed with Madison Marshall and Hamilton about the effect of Article III on the sovereign immunity of the states and was a member of the Court's majority in Chisholm. Edmund Randolph who also supported the extension of the new federal jurisdiction to diversity actions against states, argued the case for Chisholm while Attorney General for the United States. *Welch, supra.*

Justice Iredell's dissent in *Chisholm* may have argued that it was the Judiciary Act of 1789 and not Article III that prevented the federal court from entertaining Chisholm's diversity action against Georgia. Yet, Justice Iredell required an explicit statement of constitutional in-

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[4] Chief Justice Marshall's later opinions in *Cohens vs. Virginia*, 6 Wheat. 264 (1821) and *Osborne vs. Bank of The United States*, 9 Wheat. 738 (1924) have been used to argue that he could not meant what he apparently said. *Atascadero*, 473 U.S. at 268, 291-300 (Brennan, J. dissenting); *Welch*, 483 U.S. 506-510 (Brennan, J. dissenting). "Of course, the possibility that Marshall changed his views on sovereign immunity after the Constitution was ratified, or espoused a broader view of sovereign immunity only to secure ratification, does not imply that the views he expressed at the Virginia Convention should be disregarded." *Id.* at 482 n. 11.

tention before he would believe that the Constitution permitted suits against a state:

> "My opinion being, that even if the Constitution would admit of the exercise of such a power, a new law is necessary for the purpose, since no part of the existing law applies, this alone is sufficient to justify my determination in the present case. So much, however, has been said on the Constitution, that it may not be improper to intimate that my present opinion is strongly against any construction of it, which will admit, under any circumstances, a compulsive suit against the state for the recovery of money." *Chisholm*, 2 Dall. at 449.

Since there has been no explicit constitutional abrogation of state sovereign immunity nor any explicit retention of it as to federal question jurisdiction, inference is necessary. It is indisputable that "the States entered the federal system with their sovereignty intact." *Blatchford*, 501 U.S. at 779. "Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones which implication was rendered express by the 10th Amendment." *Printz*, 117 U.S. at 2376. "In our federal system, the states have a major role that cannot be pre-empted by the national government. As contemporaneous writings and the debates at the ratifying conventions made clear, the States' ratification of the constitution was predicated on this understanding of federalism." *Garcia*, 469 U.S. at 568 (Powell J. dissenting). It is this role that the Tenth Amendment protects:

> The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people. U.S. Constitution, Tenth Amendment

The states sovereignty is thus rendered residuary and inviolable. "This is reflected throughout the constitution's

text." Lane *County* v. *Oregon*, 7 Wall. 71, 19 L.Ed. 101 (1869); *Texas* v. *White*, 7 Wall. 700, 725 19 L.Ed. 227 (1869). In *Printz*, the court listed these examples of the States' sovereignty: The prohibition on any involuntary reduction or combination of states territory, Article IV, § 3; the Judicial Power clause, Article III, §2; and the Privilege and Immunities clause, Article IV, § 2, which speaks of the "citizens" of the states; the amendment provision, Article V, which requires the votes of three-fourths of the states to amend the Constitution; and the Guarantee Clause, Article IV, §4 which "pre-supposes the continued existence of the states and those means and instrumentalities which are the creation of their sovereign and reserved rights," *Helvering* v. *Gerhardt*, 304 U.S. 405, 414-415 (1938). It is reasonable to resolve the significant constitutional question of the status of state sovereign immunity within the "plan of the convention" by implication from the structure of our federalism. *Myers* v. *United States*, 292 U.S. 52 (1926) (finding by implication from Article 2, § 1 & 2 that the president has the exclusive power to remove executive officers); *Plaut* v. *Spendthrift Farm, Inc.* 514 U.S. 211 (1995) (finding that Article 3 implies a lack of congressional power to set aside final judgments) cited by *Printz*, 117 U.S. at 2379 n. 13.

The constitutionality of state sovereign immunity also finds support in this Court's Eleventh Amendment jurisprudence. This Court has held that "the very object and purpose of the Eleventh Amendment [is] to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties," and that the "Amendment is rooted in the recognition that the states, although a union, maintain certain attributes of sovereignty, including sovereign immunity . . . It thus accords the states the respect owed them as members of the federation." *P.R. Aqueduct and Sewer Authority* v. *Metcalf*

& *Eddy*, 506 U.S. 139, 146 (1993). The Court was perfectly clear in *Principality of Monaco* v. *Mississippi*, 292 U.S. 313 (1934):

> Neither the literal sweep of the words of Clause 1 of § 2 of Article III, nor the absence of restriction in the letter of the Eleventh Amendment, permits the conclusion that in all controversies of the sort described in Clause one, and omitted from the words of the Eleventh Amendment, a state may be sued without her consent. Thus Clause one specifically provides that the judicial power shall extend "to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States and the Treaties made or which shall be made, under their Authority." But although a case may arise under the constitution and laws of the United States, the judicial power does not extend to it if the suit is sought to be prosecuted against a State, without her consent, by one of her own citizens . . . Manifestly, we cannot rest with a mere literal application of the words of § 2 of Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting states. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention." *Id.* at 321-323

Upon considering *Monaco* the Court concluded that "in short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Article III." *Pennhurst*, 465 U.S. at 98.

IV. State Sovereign Immunity Should Apply Symmetrically in Federal and State Courts

If the Eleventh Amendment does not apply in state courts, federal causes of action will be asymmetrically applied in federal and state courts. The application of the Eleventh Amendment to the Fair Labor Standards Act in federal courts only, will produce the "remarkable anomaly" of "a statutory scheme in which state courts are the exclusive avenue for obtaining recovery under a federal statute". *Hilton* v. *South Carolina Pub. Ry. Comm'n*, 502 U.S. 197 (1991) (Scalia J. dissenting). The Court has suggested that where *stare decisis* does not adhere, the laws preference for symmetry might require that a state's liability or immunity be the same in both federal and state courts. *Id.*, 566. The Eleventh Amendment's application already extends beyond its text. *Seminole Tribe*, 1122. This confusing result will be avoided if it extends to state courts proceedings.

There is dicta, such as that cited in *Hilton*, which states that he Eleventh Amendment does not apply in state courts. In *Hilton*, for example, the court cites the 7th footnote in *Maine* v. *Thiboutot*, 100 S.Ct. 2502 (1980). It does state that "the Eleventh Amendment does not apply in state courts." *Maine* v. *Thiboutot*, *supra*, dealt with the question of whether a claim for welfare benefits can be brought against the state under §1983 and attorneys fees awarded under the Civil Rights Attorneys Fee Awards Act of 1976 §1988. It does not consider the question of whether or not it is rational to make state courts the exclusive tribunal for maintaining federal causes of action. *Nevada* v. *Hall*, 99 S.C. 1182 (1979), another case cited by *Hilton* does discuss sovereign immunity. It deals with the question of whether one state may be held immune in another states's courts. *Id.*, p. 1183. Relying on Mr. Justice Holmes' explanation that sovereign immunity is based "on the logical and practical ground that there can be no legal right as

against the authority that makes the law on which the right depends"[5], the decision finds that "this explanation adequately supports the conclusion that no sovereign may be sued in its own courts without its consent, but it affords no support for a claim of immunity in another sovereign's courts". *Id.*, p. 1186. Its statement that the Eleventh Amendment does not apply in state courts is dicta.

As has been explained *supra,* when the Eleventh Amendment was ratified there was no federal question jurisdiction in the federal courts. The possibility that federal legislation would require that federal causes of action be maintained against states in state court could not have been anticipated. It is not now a matter which has been carefully considered. When in *Hilton,* the Court considered the anomaly of FELA causes of action applying solely in state courts and it considered whether or not the rule of statutory construction requiring a clear statement of congressional intent to impose monetary liability on the States might not be used to resolve the anomaly, observing as follows:

> The requirement [of a clear statement by Congress] serves to make parallel two separate inquiries into state liability: Eleventh Amendment doctrine and canons of statutory interpretation. In most cases, as in *Will* and *Gregory* v. *Ashcroft,* the rule can be followed. The resulting symmetry, making a state's liability or immunity, as the case may be, the same in both federal and state courts, has much to commend it. It

[5] See, *Kawananakoa v. Polyblank,* 205 U.S. 349, 527 (1907). Justice Holmes formulation is that "a sovereign is exempted from the suit, not because of any formal conception or absolute theory, but on the logical and practical ground that there could be no legal right as against the authority that makes the law on which the right depend." *But see Seminole Tribe,* 1143-1144 (Stevens, J. dissenting)

> also avoids the federalism-related concerns that arise when the national government uses the state courts as the exclusive forum to permit recovery under a congressional statute. This is not an inconsequential argument. Symmetry in the law is more than just esthetics. It is predictability and order. But symmetry is not an imperative which must override just expectations which themselves rest upon the predictability and order of *stare decisis. Id.*, 556.

Hilton remains the sole decision of this court in which the asymmetrical application of a law imposing monetary liability on states has been upheld. Significantly, the "analysis and ultimate determination" of the case was "controlled and informed by the central importance of *stare decisis* in this Court's jurisprudence." *Id.*, 563. There was no finding that the Eleventh Amendment did not apply in state courts, though there was clearly an opportunity to make such a finding.

The *Hilton* decision refers to *Will* v. *Michigan Dept. of State Police,* 491 U.S. 58 (1989). In *Will* the Supreme Court found that state sovereign immunity was not abrogated by 42 U.S.C. 1983 because a state is not a person within the meaning of the act. *Id,* 2312. A rule of statutory interpretation from Eleventh Amendment jurisprudence requiring a clear statement was used to reach this conclusion. The court stated that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.*, 66 citing *Atascadero,* 242. The Court explained that it did not believe that §1983 could provide individuals with the right to sue states in State Court for civil right's claims because Congress did not explicitly abrogate the state's immunity under the Eleventh Amendment. The decision reasons as follows:

> That Congress, in passing 1983, had no intention to disturb the States' Eleventh Amendment immunity and so to alter the federal- state balance and in that respect was made clear in our decision in *Quern*. Given that a principal purpose behind the enactment of §1983 was to provide a federal forum for civil right's claims, and that Congress did not provide such a federal form for civil rights claims against States, we cannot accept petitioner's argument that Congress intended nevertheless to create a cause of action against States to be bought in state courts, which are precisely the courts Congress sought to allow civil rights claimants to avoid through § 1983. *Id.*, 2310.

The implication here is clear. What the Eleventh Amendment affects in federal courts should be reflected in state courts. While *Will* relies upon a rule of statutory construction, the same reasoning applies to constitutional analysis. It is, after all, deference to the constitutional significance of state sovereign immunity that led to the development of this rule of statutory construction.

Howlett v. *Rose*, 496 U.S. 356 (1990), a decision relied upon heavily by the Petitioners, has similar implications. The first paragraph of Justice Stephen's decision in this case posed the question as follows:

> The question in this case is whether a state law defense of 'sovereign immunity' is available to a school board otherwise subject to suit in a Florida court *even though such a defense would not available if the action had been bought in a federal forum*.

Id, 358-359 (emphasis added). The Court in *Howlett* found that a state law sovereign immunity defense is not available to a school board in a §1983 action brought in a State court that otherwise has jurisdiction when such defense would not be available if the action were brought in a federal forum. The decision, at least in part, may be said to turn on the symmetrical application of federal and state court jurisdiction.

The Court in *Howlett* commented that,

> "the anomaly identified by the State Supreme Court, and by the various State courts which it cited, that a state might be forced to entertain in its own courts suits from which it was immune in Federal court, is . . . fully met by our decision in *Will*. *Will* establishes that the State and the arm's of the State which have traditionally enjoyed Eleventh Amend-ment's immunity, are not subject to suit under §1983 in either Federal court or State court."

Id., 365.

The situation before the Court now differs from *Howlett* in that it was not the intent of Congress that there be no jurisdiction in Federal courts. Nevertheless, where, as here, *stare decisis* does not control, the need for order and predictability should govern. Congressional abrogation of the States' constitutional sovereign immunity via the Commerce Clause power is unconstitutional. It should be established here that "the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit . . . in either federal court or state court" pursuant to the Fair Labor Standards Act.

V. Federalism Is Our Constitution's Unique Contribution to Principles of Democratic Government.

In The Federalist Papers, Madison described the unique division of authority which distinguishes the Constitution. As opposed to "single republic" in which "all the power surrendered by the people is submitted to the administration of a single government" In the Federalist No. 51, p. 350 (J. Cooke ed. 1961) he contrasted a republic in which the powers delegated to the United States would be "few and defined," The Federalist No. 45, p. 313. The federalism that we have has a far greater role for the national government than Madison or any of the Framers could have imag-

ined. It is even far greater than living generations could imagine. See Wechsler, The Political Safeguards of Federalism: The Role of the States and the Composition and Selection of the National Government, 54 Columbia Law Review, 543 (1954) ("National action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case."), cited by *Garcia* 469 U.S. at n 9. "This Court has been increasingly generous in its interpretation of the commerce power of Congress," *Id.*, at 581 (Powell, J. dissenting). There is no reason the Constitution should rigidly conform to Madison's conception.

"Federalism was our nations own discovery. The framers split the atom of sovereignty." *U.S. Term Limits, Inc.* v. *Thornton*, 115 S. Ct. 1842, 1872 (1995) (Kennedy, J. concurring). As a result, "the people possessing this plenary bundle of specific powers were free to parcel them out to different governments and different branches of the same government as they saw fit." *Seminole Tribe*, 116 S.Ct at 1170, (Souter, J. dissenting). Madison saw this division of the government into distinct and separate departments as protecting the people against "usurpations" against their liberty. There was to be a "double security" arising "to the rights of the people" from having "different governments . . . control each other; at the same time that each will be controlled by itself." The Federalist No 51, p 351. This conception has now triumphed in Europe in the form of the principle of subsidiarity, The Treaty on European Union, Article 3b. This basic democratic principle that decisions be made at the most local level as is practical and consistent with the overall good was ours originally.

The States are themselves democratic polities accountable to the people and to their employees as constituents as well. Our federalism requires that this be respected.

CONCLUSION

The *Amicus Curiae*, Commonwealth of Kentucky, requests that the judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted this 12th day of February 1999.

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